THEIN KIM CHONG v. FOONG NEOH JI & ORS

HIGH COURT MALAYA, MELAKA
VAZEER ALAM MYDIN MEERA J
[CIVIL SUIT NO: 22NCVC-14-4-2014]
29 MARCH 2017

SUCCESSION: *Probate – Will – Validity – Administration of estate – Deceased bequeathed piece of land to younger brother in will – Will and bequeath kept confidential – Deceased's successor applied to administer and distribute estate – Application granted by land administrator and land vested on to applicants – Whether distribution order valid and lawful since deceased died testate – Whether will valid – Whether will forged and/or obtained by fraud – Wills Act 1959, s. 5*

SUCCESSION: *Distribution of estate – Will – Deceased bequeathed piece of land to younger brother in will – Will and bequeath kept confidential – Deceased's successor applied for distribution order under Small Estates (Distribution) Act 1955 to administer and distribute estate – Application granted by land administrator and land vested on to applicants – Whether distribution order valid and lawful since deceased died testate – Whether distribution order ought to be set aside*

During her lifetime, one Madam Thein ('the deceased') owned 42/336 share ('share') each in a real property ('Lot 571'). According to the plaintiff, the deceased named her younger brother who was the plaintiff's late father as the executor of her will and bequeathed all her shares in Lot 571 to him. When the plaintiff's father died intestate, the plaintiff applied to administer his estate and an order was granted appointing the plaintiff as the administrator. Unknown to the plaintiff, one of the deceased's children, the first defendant, applied for a distribution order under the Small Estates (Distribution) Act 1955 to administer and distribute the estate of the deceased and the same was granted by the land administrator ('the fifth defendant'). Pursuant to the distribution order, the deceased's share in Lot 571 was vested on to her children, the first to third defendants, and her grandchild, the fourth defendant. The plaintiff commenced the present action against the defendants on the grounds that the distribution order was wrong and invalid in law and ought to be set aside and/or cancelled. The first to fourth defendants argued that the will was forged because they had no knowledge of its existence and the deceased died intestate. The issues that arose for the court's adjudication were: (i) whether the deceased made the will; (ii) whether the will was a forgery and/or obtained by fraud; (iii) whether the distribution order was valid and lawful; and (iv) whether the distribution order ought to be set aside and the register and issue document of title for Lot 571 ought to be rectified by the fifth defendant.

Held (ordered accordingly):

(1) The plaintiff successfully discharged the burden of establishing due execution and the statutory requirements of a valid will under s. 5 of the Wills Act 1959 have been satisfied. The first to fourth defendants merely denied the execution of the will which was not of much assistance. Their oral denial, when examined against the contemporaneous documents and the compelling testimony of the solicitor who prepared the will, who was an independent and disinterested witness, was insufficient to show non-execution by the deceased. The fact that the deceased did not disclose the existence of the will was not indicative of the will being a forgery or obtained through fraud. The deceased may have wished to keep the will and her bequeath confidential. (paras 12, 16 & 22)

(2) He who alleged forgery and/or fraud must clearly and distinctly prove it. The defendants did not adduce an iota of evidence showing that the deceased's thumbprint on the will was a forgery or that the document itself was a forgery. The defendants also failed to cross-examine the plaintiff's witnesses and put their case to the plaintiff and his witnesses that the will was a forgery. In light of such failure, the defendants would be precluded from relying on this defence. Furthermore, the plaintiff tendered the original copy of the will and the defendants have not elected to have the document examined by experts to determine its originality or establish forgery. The will was valid and the last testament of the deceased. (paras 24, 25 & 32)

(3) As the deceased bequeathed her share in Lot 571 to the plaintiff's late father under the will, the share did not form the residual estate of the deceased and the defendants did not have any beneficial interest in the same to apply for the distribution order. Furthermore, when the deceased died testate, leaving a valid will, the High Court has exclusive jurisdiction to grant probate of that will, notwithstanding that it is a small estate. Therefore, by virtue of the existence of the will, the fifth defendant was not seized with the jurisdiction to grant the distribution order applied for by the first defendant. The distribution order granted to the first defendant by the fifth defendant was invalid and ought to be set aside. (paras 32 & 35)

(4) The vesting of the deceased's share in Lot 571 onto the first to fourth defendants, due to the invalidity of the distribution order, was wrong in law. In accordance with the powers under ss. 417(1) and (2)(a) of the National Land Code which enables the High Court to grant declaratory relief and direct the Registrar or land administrator to do all such things as may be necessary to give effect to any judgment or order, the vesting of the deceased's share in Lot 571 onto the first to fourth defendants was declared as invalid and of no effect. The fifth defendant was ordered to

rectify the endorsement in the register and issue document of title for Lot 571 and for the same to be reflective of the position prior to the vesting of the deceased's interest to the first to fourth defendant such that the ownership shall revert to the deceased. (paras 36, 38 & 39)

Case(s) referred to:
Ahmad Abd Majeed lwn. Habibah Abdul Majid & Satu Lagi [2007] 4 CLJ 355 CA ***(refd)***
Barry v. Butlin (1838) 163 ER 223 ***(refd)***
Brown v. Fisher (1890) 63 LT 465 ***(refd)***
Chiat Kian Rubber Works Sdn Bhd v. Southern Finance Co Bhd & Anor [1992] 1 CLJ 401; [1992] 2 CLJ (Rep) 241 HC ***(refd)***
Chua Eh Swee v. Sew Chew Eng & Anor [1981] 1 LNS 138 ***(refd)***
Dato' Toh Kian Chuan v. Swee Construction and Transport Company (Malaya) Sdn Bhd [1995] 1 LNS 317 HC ***(refd)***
Development & Commercial Bank Bhd v. Land Administrator Wilayah Persekutuan & Anor [1991] 2 CLJ 1092; [1991] 1 CLJ (Rep) 94 SC ***(refd)***
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***
Fulton v. Andrew (1875) LR 7 HL 448 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Kupusamy Sidambaram v. Verapan Sinathamby & Ors [2013] 8 CLJ 842 HC ***(refd)***
Nagaratnam Kandiah v. Satkuna Nasan S Appudurai & Anor [2013] 1 LNS 1216 HC ***(refd)***
Re Pichi Muthu [1970] 1 LNS 138 HC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Tan Kok Chuan & Anor v. Liew Nam Foong [2000] 5 CLJ 533 HC ***(refd)***
Tyrell v. Painton [1894] P 151 ***(refd)***
Wee Fook Nian v. Pendaftar Hakmilik Tanah, Melaka & Anor [1998] 1 LNS 201 HC ***(refd)***
Wong Fong Yin & Anor v. Wong Choi Lin & Anor And Another Case [2012] 1 LNS 904 HC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
National Land Code, s. 417(1), (2)(a)
Small Estates (Distribution) Act 1955, ss. 5(1), 29
Wills Act 1959, ss. 2(1), 5

For the plaintiff - Fiona Tan; M/s Yeoh Mazlina & Partners
For the 1st-4th defendants - Mazridzuan Mohamad; M/s Mazridzuan Mohamad & Co
For the 5th defendant - Yusliza Awal; State Legal Advisor, Melaka

Reported by Najib Tamby

JUDGMENT

Vazeer Alam Mydin Meera J:

[1] During her lifetime, Madam Thein Ong Lian (the "deceased") had owned a 42/336 share each in two pieces of real property, namely:

A (i) Geran Mukim MCL 418 Lot 571 (previously EMR 22), Mukim Balai Panjang, Daerah Melaka Tengah ("Lot 571"); and

(ii) Geran Mukim 49, Lot 535 Mukim Balai Panjang, Daerah Melaka Tengah ("Lot 535").

B **[2]** The deceased passed away on 11 June 1986. The first, second and third defendants are the deceased's children, whilst the fourth defendant is the deceased's grandchild.

[3] The plaintiff's case is that:

C (i) pursuant to a transfer *vide* Presentation No. 1733/84 Jilid 423 Folio 31 registered on 21 March 1984, the deceased transferred her 42/336 share in Lot 535 to the deceased's younger brother, Thein Guan Kim, who is the plaintiff's late father. (The memorandum of transfer in form 14A is at pp. 15-18 bundle A (exh. P4) and the relevant stamping and CKHT forms are at pp. 48-49 bundle A (exh. P5) and 55-58 bundle A).

D (ii) pursuant to a will dated 23 March 1984 (the "will"), the deceased named the plaintiff's late father as executor of her will and bequeathed all her 42/336 share in lot 571 to the plaintiff's late father (the will is at pp. 50-51 bundle A (exh. P1)).

E (iii) the late Thein Guan Kim died intestate on 23 April 2000. The plaintiff had on 9 July 2012 applied to the Jabatan Harta Pusaka Kecil Daerah Melaka Tengah for an order to administer the estate of his late father Thein Guan Kim, and on 13 December 2012 an order was granted appointing the plaintiff as administrator of the estate of Thein Guan Kim.

F **[4]** The plaintiff further states that by virtue of the provisions in the will, the estate of Thein Guan Kim is the beneficial owner of the deceased's 42/336 share in Lot 571. However, unknown to the plaintiff, the first defendant had applied for a distribution order under the Small Estates G (Distribution) Act 1955, to administer and distribute the estate of the deceased. The aforesaid application as made by the first defendant on the premise that the deceased had died intestate. The fifth defendant granted the distribution order dated 23 October 2008 (the "distribution order") for the estate of the deceased. Pursuant to the distribution order, the deceased's H 42/336 share in Lot 571 was vested onto the first to fourth defendants, as beneficiaries of the deceased. This vesting was done under Presentation No. 131/2009 registered on 19 January 2009, with each of the first to the fourth defendants thereafter having a 1/32 share in Lot 571 registered in their respective names.

I

[5] The plaintiff contends that the aforesaid distribution order authorising the distribution of the deceased's share in Lot 571 and the subsequent transfer of the deceased's 42/336 shares to the first to the fourth defendants in equal share of 1/32 is wrong and invalid in law by virtue of the fact that:

(i) the deceased died testate leaving behind the will; and

(ii) that Lot 571 no longer forms an asset of the estate of the deceased by reason of the deceased's bequeath of her 42/336 share in Lot 571 to the late Thein Guan Kim under the will.

[6] The plaintiff therefore brings this action as the administrator of the estate of Thein Guan Kim, the plaintiff's late father, against the first to fifth defendants, *inter alia*, for the following reliefs:

(a) A declaration that the distribution order is invalid and wrong and be set aside and/or cancelled;

(b) A declaration that the distribution and vesting of the deceased's 42/336 share in Lot 571 to the first to fourth defendants pursuant to the distribution order is invalid, wrong and be set aside and/or cancelled;

(c) A declaration that the will is the valid will and last testament of the deceased;

(d) An order that the fifth defendant cause the endorsement on the title deed for Lot 571 to reflect the original position prior to distribution to the first, second, third and fourth defendants;

(e) Alternatively, an order that the deceased's 42/336 share in Lot 571 be transferred to the plaintiff as executor and trustee based on a grant of probate of the estate of the deceased to be obtained from the court; and

(f) Costs on a solicitor and client basis.

[7] The first to fourth defendants deny that the deceased had executed the will and contend that the will is a forgery obtained by fraud. The first to fourth defendants have particularised the allegations of fraud in para. 7 of their amended defence as follows:

(i) that the deceased died intestate on 12 June 1996 without leaving any will;

(ii) the thumb print on the will is not that of the deceased;

(iii) the deceased never attended at the law office of Messrs Thakurta & Low at No. 177-C, Jalan Kilang, Melaka on 23 March 1984 or at any other times;

(iv) the deceased did not affix her thumb print on the will in the presence of Low Tung Weng, the solicitor, appointing the late Thein Guan Kim as the executor of the will and bequeathing her 42/336 shares in Lot 571 to the late Thein Guan Kim;

(v) the deceased never resided at No. 522-C, Taman Aman, Ujong Pasir, Melaka;

(vi) the deceased during her lifetime did not ever inform the first to fourth defendants about the existence of the will and the alleged bequeath of her 42/336 share in Lot 571 to the late Thein Guan Kim;

(vii) the second defendant lived with the deceased during the material time in 1984 at No. 17-3, Batu 4½ Solok Gaung Piring, Kampung Bertam Malim, Melaka, and the deceased did not inform the second defendant about the will; and

(viii) the second defendant had lodged a police report on 11 November 2013 stating that the will is a forgery.

[8] The issues to be tried are:

(i) Did the deceased make the will dated 23 March 1984?

(ii) Is the will a forgery and/or obtained by fraud?

(iii) In the event the will is valid, whether the distribution order is valid and lawful to distribute the deceased's 42/336 share in Lot 571?

(iv) Whether the distribution order ought to be set-aside and the register and issue document of title for Lot 571 ought to be rectified by the fifth defendant?

[9] The following witnesses were called at the trial, namely:

(i) PW1 - Low Tung Weng

(ii) PW2 - Thein Kim Chong

(iii) DW1 - Pong Kong Guan

(iv) DW2 - Pong Kong Seng

(v) DW3 - Azril Eddyra bin Moksan

DW1 and DW2 gave evidence for and on behalf of the first to fourth defendants, while DW3 testified for and on behalf of the fifth defendant.

[10] Before I move on to consider the issues and their determination, the record must show that the solicitor for the first to fourth defendants did not file any written submissions at close of the case, as directed by the court. Neither did counsel for the first to fourth defendants attend court on the date fixed for further oral submissions/clarifications and decision. I had enquired of counsel for the plaintiff and the fifth defendant as to the reasons for the first to fourth defendant's counsel's absence and non-filing of his written submissions and they were unable to proffer any, as they had not heard from him either. Counsel for the first to fourth defendants had also failed to call

the court and inform his reasons for non-appearance on the day fixed for further oral submissions/decision and had also failed to inform the court the reasons for his non-filing of the written submissions. I had, therefore, the benefit of only the written submissions of counsel for the plaintiff and the fifth defendant. Nevertheless, despite this rather imprudent and wholly unacceptable conduct of counsel for the first to fourth defendants, I had proceeded to consider the pleaded defence of the first to fourth defendants and examined them against the totality of evidence in coming to my decision.

[11] I will consider the first issue, ie, whether the will is the last will and testament of the deceased and whether she had properly executed it as required by law. A will is defined in s. 2(1) of the Wills Act 1959 as follows:

> "will" means a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the guardianship, custody and tuition of any child.

The plaintiff has tendered a two-page document found at pp. 50-51 of bundle A dated 23 March 1984 as the last will and testament of the deceased. The first page is the cover, whilst the second page has the contents, wherein the deceased's name is stated as the testator, and she declares and appoints her brother Thein Guan Kim (IC No: 1771846) as the executor, and there is a declaration intended to have legal effect of the intentions of a testator with respect to her property. The will is witnessed by two persons, who are named therein. The form and contents of this two page document (exh. P1) conforms to the definition of a "will" as prescribed in s. 2 of the Wills Act 1959.

[12] The requirements of a valid will are provided for in s. 5 of the Wills Act 1959 which provides as follows:

> Section 5. Mode of execution
>
> (1) No will shall be valid unless it is in writing and executed in manner hereinafter mentioned.
>
> (2) Every will shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; such signature shall be made or acknowledged by the testator as the signature to his will in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary …

The onus is on the plaintiff to prove due execution of the will in accordance to the law. In *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 the Federal Court at p. 322 neatly summed up the relevant law in the following terms:

> As regards the burden of proof, the Court of Appeal quite rightly stated the settled law ie, that where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will. In this connection, we find the approach taken by the High Court of Australia in *William Henry Bailey & Ors v. Charles Lindsay Bailey & Ors* [1924] 34 CLR 558 to be instructive.

[13] In the present case, the defendants have not raised any issue as regards testamentary capacity. They have only raised the issue of due execution and fraud. Due execution would have to be established by the plaintiff following which the defendants bear the burden of proving fraud.

[14] This burden will be *prima facie* satisfied where the will is rational on the face of it and complies with all the formal requirements of the Wills Act 1959. See *Wong Fong Yin & Anor v. Wong Choi Lin & Anor and Another Case* [2012] 1 LNS 904; *Nagaratnam Kandiah v. Satkuna Nasan S Appudurai & Anor* [2013] 1 LNS 1216

[15] This principle was very well stated by the Privy Council in the oft quoted case of *Barry v. Butlin* (1838) 163 ER 223, which has been consistently applied in our courts. In the leading case of *Tyrell v. Painton* [1894] P 151, 157, Lindley LJ after referring to the rules laid down in *Barry v. Butlin (supra)* and to the cases of *Fulton v. Andrew* (1875) LR 7 HL 448 and *Brown v. Fisher* (1890) 63 LT 465 said:

> The rule in *Barry v. Butlin*, *Fulton v. Andrew*, and *Brown v. Fisher* is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will.

[16] Having considered the evidence, I find that the plaintiff has successfully discharged his burden as regards establishing due execution and I further find that the statutory requirements of s. 5 of the Wills Act 1959 have been satisfied for the following reasons.

[17] PW1, Low Tung Weng, a solicitor and partner of the law firm of Messrs Thakurta & Low, testified in candidly that he cannot remember the details of the case as it had taken place some 30 years ago. However, upon examination of the original copy of the will (P1) dated 23 March 1984, PW1

confirmed that it appears to be the last will and testament of the deceased and that it appears to have been prepared by his office. PW1 further confirmed that he and his former clerk, Lim Kok Hong, who has since passed on, witnessed the deceased affixing her thumbprint onto P1. PW1 identified and confirmed the signatures appearing on the will attributed to the two witnesses attesting the affixing of the deceased's thumbprint are his and that of the late Lim Kok Hong.

[18] PW1 also testified that from the documents before him, he was able to ascertain that the will was prepared by his office because:

(i) it appears that the sheet cover of the will contains his then legal firm's legend known as Messrs Thakurta & Low and bears a file reference number;

(ii) the deceased's thumbprint affixed on the will was witnessed by him and his clerk as evidenced by the appearance of both their signatures on the document accompanied by a notation to that effect;

(iii) the making of the deceased's will was duly recorded in the firm's wills record book, the original of which was tendered in court by PW1 (exh. P3);

(iv) the file reference number stated in the will and in the wills record book are the same.

[19] In addition thereto, PW1 testified by reference to the wills record book (P3), that the client named therein in respect of the will is the deceased. PW1 also testified that the deceased would have attended his office on 23 March 1984 and affixed her thumbprint on the will or otherwise he would not have signed as one of two witnesses to the affixing of the deceased's thumbprint.

[20] PW1 also confirmed during cross-examination that he or his clerk would have as a matter of standard practice explained the contents of the will to the deceased. PW1 further confirmed during re-examination that in the ordinary cause of practice, the deceased would have affixed her right thumbprint in his and his clerk's presence.

[21] Peripheral to this fact, according to PW1, is the uncontroverted fact that the deceased had also transferred her share in the other land, ie, GM 49, Lot 535, District of Melaka Tengah, Melaka, around the same time to the plaintiff's late father. The solicitor who handled this transfer and who had attested the affixing of the deceased's thumbprint on the NLC Form 14A was none other than PW1. PW1 further testified that the reason why Lot 535 was transferred to her brother Thein Guan Kim, and the other land, Lot 571, was the subject matter of a will, was because the latter is a Malacca Customary

A Titles land which cannot be transferred to a non-Malay directly but was capable of being bequeathed and inherited by a non-Malay through a will. PW1 explained that such conveyancing practice, ie, through devolution upon death was practiced in Malacca in respect of Malacca Customary Titles land.

B **[22]** The first to fourth defendants merely deny the execution of the will by the deceased on grounds that the deceased would not have gone to PW1's office without their knowledge, or at the very least would have informed them of it. Theirs is merely an oral denial, which is not of much assistance to the court. This oral denial of the first to fourth defendants when examined against the contemporaneous documents and the compelling testimony of C PW1 who is an independent and disinterested witness is insufficient to show non-execution by the deceased, or to even tilt the scale of probability in favour of the first to fourth defendants contention. The fact that the deceased did not disclose the existence of the will or that she had called at the office of PW1 to execute the will is not indicative of the will being a forgery or D obtained through fraud. The deceased may have wished to keep the will and her bequeath confidential. A fact that was recognised by the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309.

[23] On the whole, I find the evidence of PW1, a senior advocate and solicitor, to be clear, concise and credible. PW1's testimony is well E corroborated by contemporaneous documentary evidence, the most important of which is the wills record book (P3), which has a contemporaneous record of the will being done in the firm of Messrs Thakurta & Low and wherein the deceased is named as the client. PW1 was firm in his evidence that he would not have put down his signature on the F will as an attesting witness if the deceased had not called at his office and affixed her thumbprint in the joint presence of him and his clerk, the other attesting witness. He reiterated that he would have done so only after the contents of the will had been read and explained to her by his clerk. I see no reason to disbelieve or reject this independent and unbiased evidence of G PW1. In this regard, I would prefer the direct evidence of PW1, a disinterested witness to that of the evidence of DW1 and DW2, which is based on mere suspicion and conjecture. See *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153; [1997] 3 MLJ 61. Thus, I find that the plaintiff has successfully discharged his burden of proof as regards due execution of the will.

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[24] The plaintiff having established due execution of the will, it now becomes incumbent upon the defendants to establish forgery and fraud as pleaded in their defence, for it is trite that he who alleges forgery and/or fraud must clearly and distinctly prove it. See *Dato' Toh Kian Chuan v. Swee* I *Construction and Transport Company (Malaya) Sdn Bhd* [1995] 1 LNS 317; [1996] 1 MLJ 730 at 733. The standard of proof required of the defendants

to establish fraud in a civil claim is that of proof on a balance of probabilities as established by the Federal Court in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584.

[25] I find that in respect of the allegation of forgery, the defendants have not adduced an iota of evidence showing that the deceased's thumbprint on the will is a forgery or that the document itself is a forgery. Not only did the defendants failed to adduce any evidence in this regard, they had also failed to cross examine the plaintiff's witnesses and put their case to the plaintiff and his witnesses that the will is a forgery. In light of such failure, the defendants would be precluded from relying on this defence. See *Re Pichi Muthu* [1970] 1 LNS 138; [1970] 2 MLJ 143 and *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212. Further, the plaintiff had tendered the original copy of the will and the defendants had not elected to have the document examined by experts to determine its originality or establish forgery. See *Tan Kok Chuan & Anor v. Liew Nam Foong* [2000] 5 CLJ 533 at 554-555.

[26] As for the allegations of fraud, the defendants have pleaded that the address of the deceased stated in the will is not her residential address at the material time and that this is indicative of fraud. The defendants contend that at the material time, the deceased resided at Batu 4½ Pulau Gadong, Klebang Besar, Melaka, whereas the address stated in the will is No. 522-C, Taman Aman, Ujong Pasir, Malacca. The defendants in the course of trial made this a bone of contention in their effort to establish fraud.

[27] When the evidence is considered in its totality, I find that the use of the Ujong Pasir in the will is innocuous and is not indicative of any sinister or fraudulent motive. PW1 stated that the address stated in the will is based on what the deceased would have told them. Further, PW2 explained that the Ujong Pasir address was used in both the will as well as the transfer form (form 14A) and stamping documents (form - section 5) in respect of the transfer of Lot 535. This conveyancing transaction is not disputed or challenged by the defendants. PW2 had during cross-examination stated that the Ujong Pasir address is the address of his uncle by the name of Lee Cheng Hock, deceased, and explained that the said address was used simply because at the material time, the Batu 4½ address was in a village with no postcode nor house/door number as it was in the middle of a paddy field. I find that there is documentary evidence to support PW2's assertion that the Batu 4½ address has no house/door number. Both the certificate of death of the deceased dated 12 June 1986 and the form A used in the first defendant's application dated 14 July 2008 for the distribution order in relation to the estate of the deceased clearly show that the Batu 4½ address did not have a house/door number. Hence, I accept the plaintiff's submission that the use of the Ujong Pasir address does not give rise to an inference of fraud or suspicious circumstances surrounding the preparation and execution of the will, and it does not in any way invalidate the will.

[28] Counsel for the defendants had during cross-examination of PW1 raised the issue of the dates in the wills record book (P3) being not in sequence, and hence suggested that the dates are fabricated. PW1 had testified during examination in chief that the wills record book (P3) was kept by his secretary who made the entries in the record book as and when the clerks having charge of any matter inform her of any particular will having been executed signed and request her to record the same in P3. Thus, the dates and numbering in P3 may or may not run in sequence because entry depends on when the secretary is notified of a particular will having been signed and sealed for her to jot down in P3. This fact was reiterated by PW1 during cross-examination and re-examination wherein PW1 further stated that this was not an anomaly as P3 was in continuous use in his office in the ordinary course of the firm's daily operations till now and that the recording has always been done in the same way. PW1 reiterated that P3 was in fact a record of wills prepared by his firm from well before 1984 till the date of trial. Having examined P3, I find it a continuous record of the wills prepared by PW1's firm, and further conclude that, for reasons given by PW1, the non-sequential dating of the wills in the wills record book does not in any way cast any aspersions on the authenticity or validity of the entries therein. I find that the contemporaneous entries in the wills record book (P3) is indicative of the fact the will was prepared by the firm of Messrs Thakurta & Low and that the deceased had attended at the office of Messrs Thakurta & Low and affixed her thumbprint in the presence of PW1.

[29] Further, counsel for the first to fourth defendants had at trial raised the issue that the date on the transfer form for Lot 535 and the date on the will are different and sought to cast aspersions. It must be gainsaid that this was not a pleaded issue and was in fact raised for the first time at trial. In any event, PW1 explained that the different dates on these two documents would probably be due to the fact that the deceased had gone to his office on different dates to execute these documents. I find that the reason for the different dates in respect of the transfer of Lot 535 and the will has been sufficiently explained by PW1 and the said difference does not affect the validity of the will. I find that nothing turns on this.

[30] DW1 and DW2 had testified that the deceased had never mentioned the existence of the will to them and that they were not aware of the deceased's intention that her properties are to be given to the plaintiff's late father. However, the plaintiff contends otherwise, and asserts that the defendants knew all along that the deceased had owned two pieces of land during her lifetime and had transferred one of it, ie, Lot 535 directly to the plaintiff's late father, but was unable to do the same for Lot 571 as it was a Malacca Customary Titles land and as such was bequeathed by way of the will. I find that it is more probable than not that the defendants knew of this fact for there is uncontroverted evidence that the plaintiff's late father had

worked on and tilled the two plots of land and had taken care of them when he was alive. The unchallenged evidence of the plaintiff is that it was the deceased's intention to transfer both Lot 571 and Lot 535 to the plaintiff's late father and it was done by way of a form 14A transfer for one plot and the will for the other plot. The deceased died some two years after executing the will. There was not attempt by the defendants to claim these two plots of land from the plaintiff's late father immediately after the death of the deceased. This I find is indicative of the fact that the defendants had knowledge of the deceased's desire to transfer both plots of land to the plaintiff's late father. It is undisputed that the plaintiff's late father, and after his passing, the plaintiff kept the original titles for both Lot 571 and Lot 535, and not any of the deceased's children. This further supports the plaintiff's contention that the aforesaid properties were intended to be given to the plaintiff's late father by the deceased.

[31] The defendants knowing well that the plaintiff was in possession of Lot 571 and having found out that Lot 571 was still registered in the name of the deceased, took advantage of the lack of grant of representation with respect to the plaintiff's late father's vested interest in Lot 571, and stealthily applied for the small estate distribution order on 14 July 2008.

[32] Therefore, when the evidence is considered in its entirety, it is clear that the defendants have failed to establish fraud or forgery. In the premise, I find that the will is valid and is the last will and testament of the deceased. As the deceased had bequeathed her share in Lot 571 to the plaintiff's late father under the will, the deceased's share in Lot 571 does not form part of the residual estate of the deceased and thus the defendants do not have any beneficial interest in the same to apply for the distribution order.

[33] The plaintiff has applied for a rectification of the register such that the fifth defendant cause the endorsement on the title deed for Lot 571 to reflect the original position prior to distribution to the first, second, third and fourth defendants, ie, that the ownership of the 42/336 share in Lot 571 in the name of the deceased be restored. Now, before this court can make an order to that effect, the distribution order granted to the first defendant by the fifth defendant must be first set aside. See *Chua Eh Swee v. Sew Chew Eng & Anor* [1981] 1 LNS 138; [1982] 1 MLJ 84 and *Wee Fook Nian v. Pendaftar Hakmilik Tanah, Melaka & Anor* [1998] 1 LNS 201; [1998] MLJU 480.

[34] In *Ahmad Abd Majeed lwn. Habibah Abdul Majid & Satu Lagi* [2007] 4 CLJ 355 the Court of Appeal held that in appropriate cases, any party affected by a distribution order granted under the Small Estates (Distribution) Act 1955 may apply to court to set aside that order by way of declaratory relief and consequential orders in that regard, instead of an appeal under s. 29 of that Act. I am of the opinion that this is one such case

where the plaintiff can apply for a declaratory order to declare the distribution order null and void as the plaintiff was unaware of the application by the first defendant seeking the distribution order, and thus it would have not been possible for the plaintiff to have appealed that decision in accordance to s. 29 of the Act.

[35] Now, a good starting point to consider the plaintiff's application for declaratory relief would be s. 5(1) of the Small Estates (Distribution) Act 1955 (Revised 1972) which provides that:

> (1) Subject to this section, nothing in this Act shall affect the exclusive jurisdiction of the High Court to grant probate of any will or testamentary disposition or letters of administration in any case in which the deceased has left a valid will or other valid testamentary disposition in respect of a small estate or part thereof and the grant when made shall have effect in all respects as if the estate had not been a small estate.

Therefore, when the deceased died testate leaving a valid will, the High Court has exclusive jurisdiction to grant probate of that will, notwithstanding that it is a small estate. Thus, in this case, by virtue of the existence of the will, the fifth defendant was not seized with jurisdiction to grant the distribution order applied for by the first defendant. Hence, the distribution order granted to the first defendant by the fifth defendant is invalid and it ought to be set aside. Accordingly, I order that the distribution order be set aside.

[36] Corollary to that order is that the vesting of the deceased's share in Lot 571 onto the first to fourth defendants by virtue of the distribution order is wrong in law, as the distribution order is invalid. The High Court is by virtue of the provisions of s. 417(1) and (2)(a) of the National Land Code, clothed with general authority to enable it to grant declaratory relief and direct the Registrar or Land Administrator to do all such things as may be necessary to give effect to any judgment or order. See the *dicta* of Mohd Azmi SCJ in *Development & Commercial Bank Bhd v. Land Administrator, Wilayah Persekutuan & Anor* [1991] 2 CLJ 1092; [1991] 1 CLJ (Rep) 94; [1991] 2 MLJ 180 on the power of the court to set aside an order by way of a declaration under s. 417 of the National Land Code and consequential order when there are no other alternative remedies available. See also the High Court decision in *Kupusamy Sidambaram v. Verapan Sinathamby & Ors* [2013] 8 CLJ 842.

[37] In *Chiat Kian Rubber Works Sdn Bhd v. Southern Finance Co Bhd & Anor* [1992] 1 CLJ 401; [1992] 2 CLJ (Rep) 241 Mahadev Shankar J (as he then was) observed that:

> The power conferred upon the Court by s. 417 of the NLC to intervene in an appropriate case is akin to specific relief which is granted on equitable principles.

[38] Therefore, in accordance to the powers under s. 417(1) and (2)(a) of the National Land Code, and applying the equitable principles formulated by the courts of equity and good conscience, I hereby declare and order that the vesting of the deceased's 42/336 share in Lot 571 onto the first to fourth defendants under presentation no. 131/2009 registered on 19 January 2009 with each of the first to fourth defendants thereafter having a 1/32 share in Lot 571 is invalid and of no effect. I further order that the fifth defendant shall take all necessary steps to rectify the register to reinstate the deceased as the registered owner of the 42/336 share in Lot 571.

[39] Wherefore, judgment was entered for the plaintiff in terms of paras. 30(a), (b), (c) and (d) of the statement of claim, that is:

(a) a declaration that the distribution order dated 23 October 2008 made by the Pentadbir Tanah Daerah Melaka Tengah under Guaman Pembahagian No. JKPTG/PK/04/01/0381/2008 in respect of the estate of Thein Ong Lian, deceased, in respect of the land held under Geran Mukim GMM 418 (previously EMR 22) and known as Lot 571, Mukim Balai Panjang, Daerah Melaka Tengah, Melaka is invalid and is thereby set aside;

(b) a declaration that the vesting of the late Thein Ong Lian's interest in the land held under Geran Mukim GMM 418 (previously EMR 22) and known as Lot 571, Mukim Balai Panjang, Daerah Melaka Tengah, Melaka to the first, second, third and fourth defendants made pursuant to the distribution order dated 23 October 2008 is invalid and is hereby set aside;

(c) a declaration that the will of the deceased dated 23 March 1984 is valid and is the last will and testament of the deceased; and

(d) an order that the fifth defendant shall cause the endorsement in the Register and issue document of title for the land held under Geran Mukim GMM 418 (previously EMR 22) and known as Lot 571, Mukim Balai Panjang, Daerah Melaka Tengah, Melaka be rectified and be reflective of the position prior to the vesting of the deceased's interest to the first, second, third and fourth defendants such that the ownership of the deceased's 42/336 share in Lot 571 shall revert to the deceased.

[40] I further ordered that cost of the action in the sum of RM10,000 be borne and paid by the first, second, third and fourth defendants to the plaintiff.